



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Sard Enterprises, Inc.

File: B-233661

Date: March 16, 1989

DIGEST

Protester fails to show that denial of a certificate of competency by Small Business Administration (SBA) was the result of bad faith or failure to consider information vital to protester's responsibility, notwithstanding protester's disagreement with SBA's conclusions, because record does not show that SBA officials acted with specific and malicious intent to harm protester.

DECISION

Sard Enterprises, Inc., protests the failure of the Small Business Administration (SBA) to issue a certificate of competency (COC) with respect to invitation for bids (IFB) No. 528-42-88, issued by the Veterans Administration (VA) for the bar coding of consolidated hospital records. Sard contends that SBA acted in bad faith and disregarded vital information in denying the protester's request for a COC.

We deny the protest.

The IFB contemplated the award of a fixed-price services contract to bar code approximately 85,000 health records at the VA Medical Center in Buffalo, New York. The contract work consisted of reviewing patient medical record folders and assigning and installing a bar code label to the folder. The purpose of the bar coding is to allow the folder to be tracked throughout the medical center. All of the IFB services are to be performed at the medical center utilizing government equipment and supplies.

The following two bids were received by the VA:

Sard	\$ 83,300
Computer Professionals Unlimited	180,200

Because of Sard's low price, the VA requested that Sard verify its price and provide a list of its qualifications and references. In addition, the agency confirmed from Sard that it was a new business with no firm experience in bar coding. The VA determined that since Sard had no proven experience in bar coding, it could not make an affirmative determination of responsibility and, because Sard was a small business, referred the issue of responsibility to the SBA for consideration for a COC. Sard timely filed its COC application, and the SBA initiated its investigation.

The SBA informed Sard that it would conduct an independent survey of the protester, reviewing both financial and technical capabilities to determine whether Sard had the requisite competence to meet the contractual requirements in a timely manner. The SBA's Las Vegas District Office investigated Sard's financial condition, experience and cost/price estimating system for the bid. The District loan officer recommended approval of the COC application based upon his finding of satisfactory financial capacity. However, the industrial specialist recommended denial based upon Sard's general capacity. Specifically, the industrial specialist questioned Sard's cost estimating for its bid, since Sard did not demonstrate that the bid prices were based upon actual knowledge of the VA Medical Center or its layout, nor based upon "actual hands-on experience in this field." The industrial specialist noted that Computer Professionals was currently working on-site and had bid twice as much as Sard. Furthermore, the industrial specialist questioned Sard's available capital for the start-up of the contract.

On November 4, 1988, the SBA's COC review committee reviewed Sard's application and the District Office recommendations and voted to deny Sard's COC application. The committee, noting that the primary cost item of the contract was labor, was concerned that Sard's low bid price did not contain all the necessary cost elements, since Sard had never performed the same or similar work and was not familiar with this VA medical center. The committee concluded that Sard did not have sufficient working capital for contract start-up or to ensure completion of the proposed contract.

Sard argues that the SBA's determination was motivated by bad faith, and points out that the SBA's letters to it and the VA stated different reasons for the COC denial. The letter to Sard stated that the COC application was denied because Sard's estimating and costing techniques were unproven while the letter to the VA, signed by the same person on the same day, stated the reason for denial as Sard's unsatisfactory credit. Also, Sard asserts that

during its debriefing with the SBA it was informed that SBA based its opinion of what was an acceptable estimate of its competitor's bid because Computer Professionals was familiar with the work site and that Sard could not demonstrate the validity of its cost estimating system because Sard had not completed sufficient contracts to demonstrate its cost realism. Further, Sard argues that SBA's requirement for site familiarity was inappropriate because the IFB did not provide for a site visit or a pre-bid conference.

The SBA states that Sard's COC application was denied because Sard was unable to demonstrate that it had sufficient working capital or access to working capital for contract start-up, and that Sard had not shown that it would generate sufficient cash flow under the contract to assure contract completion. The SBA states that the different reasons given in the letters to Sard and to VA was the result of an administrative error.

Our Office generally does not review SBA decisions regarding the issuance of a COC, since, under 15 U.S.C. § 637(b)(7)(C) (1982), SBA has conclusive authority to rule on the responsibility of small business concerns. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(3) (1988). We do so here, however, in light of Sard's allegation concerning the SBA's bad faith and failure to consider vital information. See Zan Machine Co., Inc.--Request for Reconsideration, B-229705.2, Jan. 19, 1988, 88-1 CPD ¶ 50.

Government officials are presumed to act in good faith and, therefore, to establish bad faith, a protester must present virtually irrefutable proof that government officials had a specific and malicious intent to injure the protester. American Biomedical Instrumentation, Inc., B-228598, Feb. 22, 1988, 88-1 CPD ¶ 181. There is no probative evidence of any such intent on the SBA's part.

The fact that the SBA's letters to Sard and the VA state differing reasons for the denial of the COC does not establish bad faith or an intent to injure the protester. The record indicates that the SBA's decision was based on Sard's experience, cost estimating system and financial capacity and reflected the SBA's concern that Sard, a new business with no familiarity with the work site, had bid far below its competitor's price. In this regard, while we have held that a bid cannot be rejected based merely upon its low price when the bidder is found capable of performing at the prices bid, see SMC Information Systems, B-224466, Oct. 31, 1986, 86-2 CPD ¶ 505, the SBA concluded that Sard did not have the financial capacity and credit to perform at its bid price. While Sard could reasonably disagree with the SBA's

conclusions, the protester does not show that the SBA officials acted with specific and malicious intent to harm it.

Sard also argues that SBA disregarded vital information in denying the COC application. The SBA states that Sard needed \$23,000 for contract start-up but only had \$3,568 available for working capital. Sard, however, has provided us with a copy of its corporate bank account, which shows that, on the date of the SBA's decision to deny the COC application, Sard had \$22,939 in the account. Sard contends that this establishes that it had sufficient working capital to perform the contract.

An allegation that SBA failed to consider vital information must be supported not only by a showing that the information was essential to a COC decision, but by evidence sufficient to make a prima facie showing that SBA willfully disregarded it, thus implying bad faith. J&L Properties, Inc.--Reconsideration, B-231573.2 et al., Oct. 14, 1988, 88-2 CPD ¶ 353.

The record does not establish that the information, the amount of start-up capital available, was vital or that it was purposely disregarded. The SBA based its decision not only on Sard's lack of start-up capital, but on the fact that Sard had not shown that it could generate sufficient cash flow to complete contract performance. Furthermore, the SBA questioned Sard's cost estimating system for its bid in light of Sard's unfamiliarity with the work site. Standing alone, the SBA's failure to consider Sard's bank account was not essential to the COC decision.

In any event, Sard has not shown that SBA willfully disregarded this information. At the time of the SBA District Office's review, Sard had only \$3,568 in its account. Although Sard informed the District Office that by November 1 it would have \$23,000 available from loans from relatives, the COC review committee, on November 4, had no further information available to it when it made its decision. Sard contends that it provided the SBA with access to its bank account, and that the SBA should have verified the amount of money in Sard's account on November 1. We disagree. The burden of proving its competency was on Sard, and Sard was so informed during the consideration of the COC application. See AquaSciences International, Inc.--Request for Reconsideration, B-225452.2, Feb. 5, 1987, 87-1 CPD ¶ 127. Sard bore the risk of not informing SBA of the balance in its account on November 1.

Sard also contends that SBA improperly investigated the firm's financial responsibility even though that was not requested by the VA. Contrary to Sard's belief, the COC procedures are not limited to a consideration of the deficiencies found by the contracting officer. While the SBA may evaluate information supplied by the contracting officer, it makes an independent investigation of a firm's responsibility. See 13 C.F.R. § 125.5 (1988). Furthermore, we have found it is reasonable, following an independent evaluation, for the SBA to refuse to issue a COC for a reason different from the contracting officer's basis for finding a firm nonresponsible. AquaSciences International, Inc.--Request for Reconsideration, B-225452.2, supra.

Finally, Sard contends that the award to Computer Professionals based on the VA determination of urgent and compelling reasons during the pendency of the protest violated the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(2) (Supp. IV 1986), which prohibits such awards until (1) the head of the procuring activity makes a written finding that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for a decision, and (2) our Office is advised of the finding. Sard contends that the VA did not have urgent and compelling circumstances which would justify the VA's award to Computer Professionals. However, our Office will not question an agency's determination of what are urgent and compelling circumstances which justify the award of a contract prior to our resolution of a protest, since this a determination for the agency to make. See Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23.

The protest is denied.


James F. Hinchman
General Counsel